

**STATE OF MICHIGAN
IN THE SUPREME COURT**

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Supreme Court
No. 150643

BOBAN TEMELKOSKI,

Defendant-Appellant.

Court of Appeals No. 313670
Third Judicial Circuit No: 94-000424-FH
Hon. James R. Chylinski

**PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN
RESPONSE TO THE COURT'S ORDER DATED JUNE 9, 2017**

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training, and Appeals

JULIE A. POWELL (P62448)
Assistant Prosecuting Attorney, Appeals
1441 St. Antoine, Room 1103
Detroit, MI 48226
Phone: (313) 224-8817

TABLE OF CONTENTS

Table of Authorities	iii
Counterstatement of Issues Presented for Review	1
Counterstatement of Facts	3
Argument	7
I. The Legislature cannot divest the circuit court of jurisdiction to hear constitutional challenges to a statute. Here, even though MCL 28.728c(4) purports to limit a registrant's challenges to SORA to those specified in the statute and to foreclose constitutional challenges, it must be read to permit such challenges to comport with the United States and Michigan Constitutions. The circuit court had jurisdiction to review defendant's constitutional challenges to his sex offender registration requirements	8
Standard of Review	8
Discussion	9
A. The legislature cannot divest circuit courts of subject matter jurisdiction to hear constitutional challenges to statutes	8
B. MCL 28.728c(4) did not divest circuit courts of subject matter jurisdiction to hear constitutional challenges to a sex offender's registration and reporting requirements under SORA.	10
II. A criminal defendant is not denied due process of law when he pleads guilty pursuant to a statute that offers potential benefits that only become effective upon the completion of a future event and when a condition precedent to the completion of a future event can be revoked by the trial court at any time. Here, defendant was not entitled to receive the potential benefits offered under HYTA until his final discharge from HYTA, and the trial court could revoke defendant's HYTA status at any time. Defendant was not denied due process of law when he was ordered to register as a sex offender before he had been discharged from HYTA.	14
Standard of Review	14
Discussion	14

A.	Requiring defendant to register as sex offender did not render defendant's guilty plea involuntary or otherwise violate due process of law.	14
1.	Defendant has not established that he was promised anything by the prosecution or the trial court that induced his guilty plea ...	17
2.	Upon discharge from HYTA, defendant received the benefits that existed under HYTA at the time of his discharge	22
B.	HYTA does not create an enforceable contract between youthful assignees and the state.. ..	24
III.	The Sixth Circuit Court of Appeals held in <i>Does #1-5 v Snyder</i> that applying the 2006 and 2011 amendments to SORA to registrants convicted prior to those dates constituted punishment and thus violated the prohibition against enacting ex post facto laws. The State of Michigan sought certiorari in the United States Supreme Court and its certiorari petition is pending in the United States Supreme Court. The United States Supreme Court's final action may prove determinative to the resolution of certain issues pending in the instant case. This Court should hold this matter in abeyance pending the United States Supreme Court's final action in <i>Does # 1-5 v Snyder</i>	28
	Standard of Review	28
	Discussion	28
	Relief	30

INDEX OF AUTHORITIES

FEDERAL CASES

Brady v. U.S., 399 U.S. 742 (1970).	15
John Does 1-4, et. al. v. Snyder, et. al., 834 F.3d. 696 (6 th Cir., 2016).	28
Natl R. Passenger Corp. v. Atchison, Topeka & Santa Fe R. Co., 470 U.S. 45 (1985).	24, 32
Santobello v. New York, 404 U.S. 257 (1971).	14, 15, 16
United States v. Skidmore, 998 F.2d. 327 (6 th Cir., 1993).	20
United States v. Under Seal, 709 F.3d. 257 (4 th Cir., 2013).	27

STATE CASES

A.F.T. Michigan v. Michigan, 497 Mich. 197 (2015)	24
Aguirre v. Michigan, 315 Mich. App. 706 (2016)	14, 25
Band v. Livonia Associates, 176 Mich. App. 95 (1989)	3
Campbell v. St. John Hosp., 434 Mich. 609 (1990)	10
Harvey v. Michigan, 469 Mich. 1 (2003)	10, 14, 28
Hillsdale County Sr. Services, Inc. v. Hillsdale County, 494 Mich. 46 (2013)	10

In re Certified Question, 447 Mich. 765 (1994)	26
In re Petition by Treasurer of Wayne County for Foreclosure v. Perfecting Church, 478 Mich. 1 (2007)	10, 11, 12, 13
Lahiti v. Fosterling, 357 Mich. 378 (1959)	22
Nye v. Gable, Nelson & Murphy 169 Mich. App. 411 (1988)	18
Okrie v. Michigan, 306 Mich. 445 (2014)	9
People v. Cobbs, 443 Mich. 276 (1993)	19
People v. Cole, 491 Mich. 325 (2012)	15
People v. Costner, 309 Mich. App. 22 (2015)	34
People v. Gallego, 430 Mich. 443 (1988)	15, 16, 17
People v. Jennnings, 178 Mich. App. 334 (1989)	16
People v. Johnson, 210 Mich. App. 630 (1995)	15, 17
People v. Killebrew, 416 Mich. 189 (1983)	14, 15
People v. Temelkoski, 307 Mich. App. 241 (2014)	6
Studier v. Michigan Public School Employees Retirement Board, 472 Mich. 642 (2005)	24, 25, 26

Winkler by Winkler v. Marist Fathers of Detroit, Inc., ____ Mich. ____ (2017)	10
--	----

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES

U.S. Const., art.1, §10	24
Const. 1963, art. 1, §1	24
Const. 1963, art. VI, §13	9
Const. 1963, art. VI, §17	9
MCL 28.721	8
MCL 28.722	11
MCL 28.725	11
MCL 28.728c	4, 10, 11, 21
MCL 28.730	21
MCL 28.736	23
MCL 762.11	11, 24
MCL 762.14	2, 21, 24
MCL 750.224f	23
MCL 770.50	23
MCR 6.302	12
MCR 6.502	12
MCR 7.203	12

Counterstatement of Issues Presented for Review

I. (Supplemental leave question 3)

The Legislature cannot divest the circuit court of jurisdiction to hear constitutional challenges to a statute. Here, even though MCL 28.728c(4) purports to limit a registrant's challenges to SORA to those specified in the statute and to foreclose constitutional challenges, it must be read to permit such challenges to comport with the United States and Michigan Constitutions. Did the circuit court have jurisdiction to review defendant's constitutional challenges to his sex offender registration requirements?

The People answer: "YES."

Defendant answers: "YES."

The trial court did not answer this question.

The Court of Appeals did not answer this question.

II. (Supplemental leave question 2)

A criminal defendant is not denied due process of law when he pleads guilty pursuant to a statute that offers potential benefits that only become effective upon the completion of a future event and when a condition precedent to the completion of a future event can be revoked by the trial court any time. Here, defendant was not entitled to receive the potential benefits offered under HYTA until his final discharge from HYTA, and the trial court could revoke defendant's HYTA status at any time. Was defendant denied due process of law when he was ordered to register as a sex offender before he had been discharged from HYTA?

The People answer: "NO."

Defendant answers: "YES."

The trial court did not answer this question.

The Court of Appeals did not answer this question.

III.

The Sixth Circuit Court of Appeals held in *Does #1-5 v Snyder* that applying the 2006 and 2011 amendments to SORA registrants convicted prior to those dates constituted punishment and thus violated the prohibition against enacting ex post facto laws. The State of Michigan sought certiorari in the United States Supreme Court and its certiorari petition is pending in the United States Supreme Court. The United States Supreme Court's final action may prove determinative to the resolution of certain issues pending in the instant case. Should this Court hold this matter in abeyance pending the United States Supreme Court's final action in *Does # 1-5 v Snyder*?

The People answer: "YES."

Defendant answers: "YES."

The trial court did not answer this question.

The Court of Appeals did not answer this question.

Counterstatement of Facts

In 1993, according to the Hamtramck Police Department report in this case, defendant, Boban Temelkoski, was 19-years old when he drove the 12-years old victim home from her catering job. According to the victim, Defendant pulled into an alley and began kissing her face and neck. Defendant then straddled the victim's body, rendering her immobile, undid her blouse and bra, and began fondling and kissing her breasts and fondling her buttocks. The victim told defendant to stop and reminded him that she was only 12-years old but defendant continued to kiss and grope her for several more minutes.¹ Defendant then drove the victim home and warned her to remain quiet about the incident.

On November 30, 1993, defendant was charged with one count of second-degree criminal sexual conduct on a person under 13-years old (Defendant-Appellant's Appendix 5a). Following several pretrial hearings, on March 4, 1994, defendant pled guilty to one count of second-degree criminal sexual conduct involving a person under 13-years old and was assigned Holmes Youthful Trainee Act (HYTA) status for a period of 3 years (Defendant-Appellant's Appendix 7a; Defendant-Appellant's Appendix 11a).² As conditions of his probation, Defendant-Appellant was ordered to, *inter alia*, (1) not violate any criminal laws; (2) not leave the state without consent of the court; (3)

¹Plaintiff-Appellee takes issue with Defendant-Appellant's characterization and minimization of this offense as consensual but for the victim's age. First, there is no record evidence that this was consensual. Moreover, there is no record evidence in this matter of the factual basis of defendant's guilty plea, sentencing, or other trial court proceedings that are germane to the issues presented on appeal. As the moving party in the trial court and the Appellant in this Court, it was Defendant-Appellant's duty to provide the record on appeal, including the transcripts of the trial proceedings necessary to the resolution of his claims. *Band v Livonia Associates*, 176 Mich App 95, 103-104 (1989), citing MCR 7.210(A)(1) and MCR 7.210(B)(1)(a). This Court's review is limited to record evidence. *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 414, 416-417 (1988).

²MCL 762.11, et seq.

make truthful reports to his probation officer monthly or as directed by the probation officer; (4) pay a monthly supervision fee; (5) perform fifty hours of community service; (6) seek and maintain employment; (7) complete high school or a vocational training program; (8) participate in a substance abuse monitoring or treatment program; and (9) have no contact with complainant (Defendant-Appellant's Appendix 11a).

On April 1, 1996, an amended order of probation was entered requiring that Defendant-Appellant register as a sex offender pursuant to Sex Offender Registration Act (SORA).³ The amended order directed in relevant part:

Pursuant to Public Acts 295 and 286 of 1994, you must also provide notification in person with the local law enforcement agency, Sheriff's Dept., of [sic]State Police W\N [sic]10 days of any address change. You must provide a complete copy of the Michigan Sex Offender Registration form to your field agent W\IN 10 days of any address change. (Defendant-Appellant's Appendix 12a).

It is unclear if a hearing was held on the date the amended order of probation was entered. Apparently, defendant registered as a sex offender as required by the amended order of probation as the docket entries do not reveal any violations of probation for failing to do so. On April 16, 1997, an order of dismissal was entered, indicating that Defendant-Appellant had successfully completed his HYTA assignment (Defendant-Appellant's Appendix 13a).

On August 9, 2012, defendant moved for removal from SORA. Defendant argued that he should be permitted to discontinue registration under SORA because his registration constituted cruel or unusual punishment under the United States and Michigan Constitutions. Defendant specifically argued that his continued registration constituted cruel or unusual punishment because

³MCL 28.721, et seq.

he was not “convicted” of a sexual offense, the sexual offense was not “grave or severe,” and the punishment of registration had caused defendant to suffer many hardships.

On September 20, 2012, Plaintiff-Appellee filed an answer in opposition to Defendant-Appellant’s petition. On September 21, 2012, a hearing was held on defendant’s petition. Following argument by the parties, the trial court granted defendant’s petition:

Here’s my ruling:

One, Holmes Youthful Trainee is not a conviction, and it’s not subject to S.O.R.A. That’s—it may be in the face of the law that you have, but that’s my ruling.

Second thing is, this is an ex post facto law. He was not subject to the law at the time that he was sentenced. All of a sudden, they pass a law later saying that he has to register. It’s similar to them passing a law saying that anyone named Powell, who had been previously admitted to the Bar and has practiced in Michigan, can no longer practice [sic] Michigan and the State—in the State. It’s similar to that type of thing.

And thirdly, I’ll make a ruling, so that you have a proper record for the Court of Appeals. This is a punishment. I don’t care what they call it. It’s obvious it’s a punishment, that it affects somebody’s life in the way of trying to get jobs, trying to, trying to do whatever they have to do, especially on something that was dismissed under Holmes Youthful Trainee. So, I find that it is a punishment, and that it—because of that, I’m gonna grant the motion to remove him from the Sex Registry. I hope that’s a sufficient record for you (Defendant-Appellant’s Appendix 27a-28a, 30a).⁴

On December 4, 2012, Plaintiff-Appellee sought delayed leave to appeal the trial court’s order granting defendant’s petition to be removed from SORA. In an order dated July 8, 2013, the Michigan Court of Appeals denied the Plaintiff-Appellee’s delayed application for leave to appeal for lack of merit in the grounds presented.⁵ On August 22, 2013, Plaintiff-Appellee sought

⁴References to the trial record are cited by the date of the hearing followed by the page number.

⁵Order, *People v Temelkoski*, (Docket No 313670, 7/8/2013).

application for leave to appeal in this Court. In an order dated October 28, 2013, this Court remanded the matter to the Court of Appeals for consideration as on leave granted.⁶

On October 21, 2014, in a published opinion, the Court of Appeals concluded that SORA was not punishment and did not violate the constitutional prohibitions against enacting ex post facto laws or the imposition of cruel or unusual punishment. The Court of Appeals concluded that the trial court erred in concluding otherwise and vacated the trial court's order granting Defendant-Appellant's removal from SORA.⁷ Defendant-Appellant sought application for leave to appeal in this Court. In an order dated December 18, 2015, this Court granted defendant's application for leave to appeal and directed the parties to address the following issues:

(1) whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721, *et seq.*, amount to "punishment", see *People v Earl*, 495 Mich 33 (2014); (2) whether the answer to that question is different when applied to the class of individuals who have successfully completed probation under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*; (3) whether MCL 28.722(b) (defining HYTA status to be a "conviction" for purposes of SORA) provides the defendant constitutionally sufficient due process where the defendant is required to register pursuant to SORA as if he had been convicted of an offense, notwithstanding that upon successful completion of HYTA the court is required to "discharge the individual and dismiss the proceedings" without entering an order of conviction for the crime; MCL 762.14; US Const, Am XIV; Const 1963, art 1, § 17; (4) whether, assuming that the requirements of SORA do not amount to "punishment" as applied to the defendant, application of the civil regulatory scheme established by SORA to the defendant otherwise violates guarantees of due process; (5) whether requiring the defendant to register under SORA is an ex post facto punishment, where the registry has been made public, and other requirements enacted, only after the defendant committed the instant offense and pled guilty under HYTA, US Const, art 1, §10; and (6)

⁶Order, *People v Temelkoski*, (Docket No 313670, 10/28/2013).

⁷*People v Temelkoski*, 307 Mich App 241, 244 (2014).

whether it is cruel and/or unusual punishment to require defendant to register under SORA, US Const, Am VIII; Const 1963, art 1, § 16.⁸

On August 25 2016, the Sixth Circuit Court of Appeals found that the 2006 and 2011 amendments to SORA as applied to defendants convicted before the amendments constituted punishment and violated the prohibition against ex post facto laws. On December 14, 2016, the State of Michigan filed a petition for a writ of certiorari in the United States Supreme Court challenging the Sixth Circuit's opinion. The State of Michigan's petition is pending before the United States Supreme Court and is scheduled for conference on September 25, 2017.

In an order dated June 9, 2017, this Court *sua sponte* ordered that the instant case be set for reargument and resubmission at the October, 2017 session. This Court further directed the parties to file supplemental briefs addressing the following three questions:

(1) whether this case should be held in abeyance pending final action by the United States Supreme Court in *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016); (2) whether a criminal defendant is denied due process of law if a statute offers a benefit in exchange for pleading guilty, the defendant's plea is induced by the expectation of that benefit, but the benefit is vitiated in whole or part, see *Santobello v New York*, 404 US 257, 251 (1971); *Studier v Michigan Public School Employees' Retirement Board*, 472 Mich 642, 660 (2005); and (3) whether the Wayne County Circuit Court had jurisdiction over the defendant's claim in light of MCL 28.728c(4).⁹

Additional facts may be presented *infra* in the Argument sections of this brief.

⁸Order, *People v Temelkoski*, (Docket No 150643, 12/18/2015).

⁹Order, *People v Temelkoski*, (Docket No 150643, 6/9/2017).

Argument

I. (Supplemental leave question 3)

The Legislature cannot divest the circuit court of jurisdiction to hear constitutional challenges to a statute. Here, even though MCL 28.728c(4) purports to limit a registrant's challenges to SORA to those specified in the statute and to foreclose constitutional challenges, it must be read to permit such challenges to comport with the United States and Michigan Constitutions. The circuit court had jurisdiction to review defendant's constitutional challenges to his sex offender registration requirements.

Standard of Review

Whether a trial court has subject matter jurisdiction to hear a matter is also a question of law that this Court reviews de novo.¹⁰ Whether a statute is constitutional is a question of law this Court reviews de novo.¹¹ Although neither party challenged the circuit court's subject-matter jurisdiction in the circuit court, the Court of Appeals, or in this Court, subject matter jurisdiction may be raised at any time and it is not waivable.

¹⁰*Hillsdale County Sr. Services, Inc v Hillsdale County*, 494 Mich 46, 51-52 (2013).

¹¹*Harvey v Michigan*, 469 Mich 1, 6 (2003).

Discussion

A. The legislature cannot divest circuit courts of subject matter jurisdiction to hear constitutional challenges to statutes.

Under the Michigan Constitution, circuit courts are “constitutional courts” that are part of the one court of justice and expressly authorized by Michigan’s Constitution to exercise the judicial power.¹² The Michigan Constitution further provides that:

The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court.¹³

MCL 600.605 further provides:

Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.

As a general rule, the jurisdiction of circuit courts cannot be diminished by statute.¹⁴ This Court has consistently defined subject matter jurisdiction thusly:

[j]urisdiction over the subject-matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it

¹²Const 1963, art VI, § 1.

¹³Const 1963, art VI, §13.

¹⁴*Okrie v State of Michigan*, 306 Mich 445 (2014).

is pending, because of some inherent facts which exist and may be developed during the trial.¹⁵

It is presumed that the circuit court has jurisdiction. The intent to “divest the circuit court of jurisdiction must be clearly and unambiguously” stated.¹⁶ Statutes are presumed constitutional, and courts must construe them as such whenever possible.¹⁷

B. MCL 28.728c(4) did not divest circuit courts of subject matter jurisdiction to hear constitutional challenges to a sex offender’s registration and reporting requirements under SORA.

Pursuant to SORA amendments effective July 2011, certain sex offenders may petition the circuit court to have their registration requirements changed. MCL 28.728c details the procedure to discontinue. MCL 28.728c(4) provides in relevant part

This section is the sole means by which an individual may obtain judicial review of his or her registration requirements under this act. This subsection does not prohibit an appeal of the conviction or sentence as otherwise provided by law or court rule. A petition filed under this section shall be filed in the court in which the individual was convicted of committing the listed offense. However, if the conviction occurred in another state or country and the individual is a resident of this state, the individual may file a petition in the circuit court in the county of his or her residence for an order allowing him or her to discontinue registration under this act only.

The plain language of MCL 28.728c(4) indicates that the legislature plainly and unambiguously intended to limit the circuit court’s jurisdiction to grant registrants relief limited to the situations specified in the statute. MCL 28.728c(4) does not prohibit appeals of a registrant’s conviction or sentence as “otherwise provided by law or court rule.”

¹⁵*Winkler by Winkler v Marist Fathers of Detroit, Inc*, __ Mich __ (2017), quoting *Joy v Two-Bit Corp*, 287 Mich 244, 253-254 (1938)(quotation marks and citation omitted in original).

¹⁶*Campbell v St John Hosp*, 434 Mich 609, 613-614 (1990)(citations omitted).

¹⁷*In re Petition By Treasurer of Wayne County For Foreclosure v Perfecting Church*, 478 Mich 1, 9 (2007).

Second-degree criminal sexual conduct committed by an adult registrant against a child under the age of 13 is classified as a Tier III offense.¹⁸ A person convicted of a Tier III offense is classified as a Tier III offender¹⁹ and is required to register as a sex offender for life.²⁰ A Tier III offender may seek discontinuation of his registration pursuant to MCL 28.728c (13), MCL 28.728c(14), or MCL 28.728c(15).²¹

MCL 28.728c(13) and MCL 28.728c(15) apply to juvenile offenders and do not apply to defendant, who was 19-years old when he forcibly sexually assaulted the 12-year old victim in a dark alley. MCL 28.728c(14) applies to *consensual sexual acts* between youthful offenders and similarly-aged victims.²² Additionally, the victim must be over 13 years old and the offender must be no more than 4 years older than the victim. Because the listed offense here was a forcible sexual assault committed by an adult against a 12-year old child, defendant is not entitled to relief under MCL 28.728c(14).

The next question is whether defendant can seek an appeal of his “conviction or sentence as otherwise provided by law or court rule.”²³ Because defendant waited nearly 20 years to challenge his SORA registration and reporting requirements, his direct appellate rights have long since

¹⁸MCL 28.722(w)(vi).

¹⁹MCL 28.722(w)(ii).

²⁰MCL 28.725(12).

²¹MCL 28.728c(2) and (3).

²²MCL 28.728c(14)(emphasis added).

²³MCL 28.728c(4).

expired.²⁴ Likewise, because defendant successfully completed his HYTA assignment, he does not have a conviction or sentence for the purpose of filing a motion for relief from judgment.²⁵

Thus, defendant's only avenue to challenge the constitutionality of his registration was to file a petition under MCL 28.728c(4). Although defendant's motion to discontinue SORA registration was not labeled as a motion filed under MCL 28.728c(4), he did file it in circuit court and moved to discontinue his sex offender registration. As discussed *supra*, MCL 28.728c(4) is the only avenue for defendant to challenge his registration requirements under SORA. Based on a plain reading of MCL 28.728c(4), the circuit court lacked subject matter jurisdiction to review defendant's constitutional challenge to his registration requirements.

This, however, does not end the analysis. In *In re Petition of Treasurer of Wayne County for Foreclosure v Perfecting Church*, this Court considered a constitutional challenge to the General Property Tax Act (GPTA), which deprived circuit courts of jurisdiction to modify judgments of foreclosure even when a property owner was denied due process.²⁶ This Court concluded that the GPTA, as applied to a limited class of property owners, violated due process under the United States and Michigan Constitutions because the GPTA insulated constitutional violations from judicial review and redress.²⁷ This Court concluded that the "Legislature cannot create a statutory regime that allows for constitutional violations with no recourse" and read the part of the GPTA purporting

²⁴MCR 7.203.

²⁵MCR 6.502(A).

²⁶*In re Treasurer, supra*, at 4, citing MCL 211.1, et seq.

²⁷*Id.* at 4, citing MCL 211.78k(6).

to limit the circuit court's jurisdiction to review and modify judgments of foreclosure as unconstitutional.²⁸

This Court must presume that a statute is constitutional and must construe it as such whenever possible.²⁹ Reading MCL 28.728c(4) to divest the circuit court of subject matter jurisdiction to hear a defendant's constitutional challenge to his SORA registration requirements would render MCL 28.728c(4) unconstitutional. Under the Michigan Constitution, circuit courts are "constitutional courts" and are empowered to exercise the judicial power. The linchpin of judicial power is the power to review the constitutionality of statutes. Thus, MCL 28.728c(4) must be read to permit registrants to raise constitutional challenges to their SORA registration and reporting requirements.³⁰ Accordingly, the circuit court had subject matter jurisdiction to hear defendant's constitutional challenge to his registration requirements under SORA.

²⁸*In re Treasurer, supra*, at 11.

²⁹ *Id.* at 9.

³⁰*In re Treasurer, supra*, at 11.

II. (Supplemental leave question 2)

A criminal defendant is not denied due process of law when he pleads guilty pursuant to a statute that offers potential benefits that only become effective upon the completion of a future event and when a condition precedent to the completion of a future event can be revoked by the trial court any time. Here, defendant was not entitled to receive the potential benefits offered under HYTA until his final discharge from HYTA, and the trial court could revoke defendant's HYTA status at any time. Defendant was not denied due process of law when he was ordered to register as a sex offender before he had been discharged from HYTA.

Standard of Review

Constitutional issues present questions of law that this Court reviews de novo.³¹ Whether a contract exists is question of law that this Court reviews de novo.³² The interpretation of a contract presents a question of law that this Court reviews de novo.³³

Discussion

A. Requiring defendant to register as sex offender did not render defendant's guilty plea involuntary or otherwise violate due process of law

The resolution of criminal cases by guilty pleas pursuant to plea bargain or sentence agreement is a well-established and accepted practice in the criminal justice system.³⁴ In *Santobello v New York*, the United States Supreme Court recognized “plea bargaining [as] ‘an essential component of the administration of justice.’”³⁵ When a defendant pleads guilty, he waives several

³¹*Harvey, supra*, 469 Mich at 6.

³²*Aguirre v Michigan*, 315 Mich App 706, 713 (2016)(citations omitted).

³³*Id.*

³⁴*People v Killebrew*, 416 Mich 189, 197 (1983).

³⁵*Santobello v New York*, 404 US 257, 260 (1971).

important constitutional rights, including his right to a jury trial. To comport with due process, a defendant's waiver of these important constitutional rights must be voluntary.³⁶ Insuring the voluntariness of a defendant's guilty plea protects the defendant's rights, the accuracy of the plea, and discourages pleas that were induced by undesirable methods or promises.³⁷

A guilty plea comports with due process when it is knowing, understanding, and voluntary.³⁸ When the prosecution and the defendant agree to a plea or sentence agreement in exchange for a guilty plea, the trial court can either accept the agreement, reject it, or defer action until the trial court can consider the presentence report.³⁹ While not bound by agreements negotiated between a defendant and the prosecution, "once a trial court accepts a plea which was induced by such an agreement, the terms of that agreement must be fulfilled."⁴⁰ "[W]hen a plea rests in any significant degree on *a promise or agreement with the prosecutor*, so that it can be said to be part of the inducement or consideration, *such promise* must be fulfilled."⁴¹ A breach of a promise that induced the plea agreement violates due process.⁴² When the agreement is not followed, the trial court has

³⁶*Brady v United States*, 397 US 742, 752 (1970).

³⁷*Killebrew, supra*, at 203, citing McCoy & Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 Stanford L Rev 87, 899-900 (1980).

³⁸*People v Cole*, 491 Mich 325, 332-333 (2012)(citations omitted).

³⁹*People v Johnson*, 210 Mich App 630, 632-633 (1995)(citations omitted).

⁴⁰*Santobello, supra*, at 262; *Killebrew, supra*, at 207.

⁴¹*Santobello, supra*, at 262 (emphasis added).

⁴²*People v Gallego*, 430 Mich 443, 449 (1988).

discretion to choose between vacating the guilty plea or ordering specific performance, “with defendant’s choice of remedy accorded considerable weight.”⁴³

In *Santobello v New York*, in exchange for the defendant’s guilty plea, the prosecutor promised not to make a sentencing recommendation.⁴⁴ At sentencing, another prosecutor appeared and recommended that the trial court sentence defendant to the maximum sentence. The trial court sentenced the defendant to the maximum sentence.⁴⁵ The United States Supreme Court found that the prosecution’s promise not to make a recommendation at sentencing materially induced the defendant’s guilty plea and that the prosecution’s breach of this promise rendered the defendant’s guilty plea involuntary and violated due process.⁴⁶

Although *Santobello* recognized that due process protects plea agreements that are induced by unkept promises made by the prosecution, it did not reach the issue of whether the due process clause required a particular remedy, such as specific performance, as the remedy for unkept plea agreements.⁴⁷ In *Mabry v Johnson*, the United States Supreme Court explained that *Santobello* expressly declined to hold that the Constitution compels specific performance of a broken

⁴³*People v Jennings*, 178 Mich App 334, 336-337 (1989).

⁴⁴*Santobello, supra*, at 258.

⁴⁵*Id.* at 258-259.

⁴⁶*Id.* at 262.

⁴⁷*Gallego, supra*, at 450.

prosecutorial promise as the remedy for such a plea. Instead, the Court made it clear that there was a “range of constitutionally appropriate remedies.”⁴⁸

In *People v Johnson*, the Michigan Court of Appeals held that a trial court’s addition of additional probation conditions that were not part of the plea agreement did not violate due process. The Court explained that the addition of additional probation conditions did not breach the promises that induced the plea because (1) the trial court has discretion to ““impose other lawful conditions of probation as the circumstance of the case require or warrant, or as in its judgment are proper”⁴⁹ and (2) probation is ““at all times alterable and amendable, both in form and substance, in the court’s discretion.”⁵⁰ Further, failure to inform the defendant of these added conditions before he pled guilty did not render the defendant’s plea involuntary or unknowing.⁵¹

1. Defendant has not established that he was promised anything by the prosecution or the trial court that induced his guilty plea.

Defendant argues that at the time of his guilty plea, he was promised that “he would suffer no further consequences and have no conviction if he successfully completed HYTA.” Defendant further maintains that re-defining his “non-conviction” and requiring him to register as a sex offender violated due process “because it vitiates the state’s promises under HYTA, deprives Mr. Temelkoski of fair warning of the consequences of his plea, and upsets his settled expectations” (Corrected Defendant-Appellant’s Brief On Appeal, 8-9).

⁴⁸*Gallego, supra*, at 450, quoting *Mabry v Johnson*, 467 US 504, 510 n 11 (1984), citing and quoting *Santobello, supra*.

⁴⁹*People v Johnson*, 210 Mich App 630, 634, (1995), quoting MCL 771.3(4).

⁵⁰*Id.* at 634, quoting MCL 771.2(2).

⁵¹*Id.* at 634.

The starting point for determining whether a guilty plea was involuntary because it was induced by an unfulfilled promise made by the prosecution or the trial court is the guilty plea itself. Toward this end, “a verbatim record must be made of the plea proceeding.”⁵² At a minimum, this would include a signed plea form indicating the existence of a plea or sentencing agreement and the terms of the agreement. As the party challenging the voluntariness of his guilty plea, defendant must establish the factual predicate for his claim.⁵³ He must, in the first instance, establish that he was promised something by the prosecution or the trial court that induced his guilty plea. Defendant has failed to establish that he was promised *anything* to induce his guilty plea.

First, there is *no* evidence that the prosecution entered into a plea agreement or otherwise promised defendant anything in exchange for his guilty plea. The scant record evidence available indicates the contrary. The docket entries, order of probation, and HYTA referral slip all prove that defendant was charged with a single count of second-degree criminal sexual conduct involving a child under 13-years old and that defendant pled guilty as charged to that offense (Defendant-Appellant’s Exhibits 1a-15a). None of these documents establish the existence of a plea agreement between defendant and the prosecution. There is no plea form indicating that the prosecution agreed to any sentencing recommendation or even not to object to HYTA assignment. It bears noting that

⁵²MCR 6.302(F). In order to ensure that the defendant’s rights were adequately protected, that the procedural safeguards were followed, and to facilitate judicial review of challenges to the voluntariness of a guilty, a “verbatim record must be made of the plea proceeding.” *Id.*

⁵³As the moving party in the trial court and the Appellant in this Court, it was Defendant-Appellant’s duty to provide the record on appeal, including the transcripts of the trial proceedings necessary to the resolution of his claims. *Band v Livonia Associates*, 176 Mich App 95, 103-104 (1989), citing MCR 7.210(A)(1) and MCR 7.210(B)(1)(a). This Court’s review is limited to record evidence. *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 414, 416-417 (1988).

the trial court has the discretion to assign a defendant to HYTA status without the prosecution's consent and over its objection.

Likewise, there is no record evidence that the trial court promised to assign defendant to HYTA status if he pled guilty to the charged offense. There is no evidence that defendant pled guilty pursuant to a *Cobbs*⁵⁴ evaluation, where the trial court agreed to assign him to HYTA status. At best, the scant record evidence supports the inference that defendant was statutorily eligible for HYTA assignment and that he filed a motion to be placed on HYTA assignment. The docket entries appear to show that following a pretrial conference on January 20, 1994, defendant filed a motion on February 11, 1994 to be placed on HTYA assignment (Defendant-Appellant's Exhibits 6a-6b).

The docket entries also indicate that February 11, 1994 was the final conference date and that defendant was referred to the Probation Department to be evaluated for suitability for HYTA assignment (Defendant-Appellants Exhibits 6a-6b, 9a-10a). In fact, the referral to the Probation department indicated that it was for a pre-acceptance investigation "for the purpose of obtaining information useful" to the Court to determine defendant's "suitability for assignment to the status of Youthful Trainee" (Defendant-Appellant's Exhibit 9a-10a). The plain language of the referral order document, which was signed by defendant, supports the conclusion that defendant was not promised HYTA assignment prior to pleading guilty.

Thus, defendant has failed to establish that there was a sentence agreement with the prosecution, a *Cobbs* evaluation with the trial court, or that he was promised anything that induced his guilty plea. At best, defendant has established that he was eligible for HYTA, that he filed a motion to be assigned HYTA status, and that he pled guilty hoping to be assigned HYTA status. If

⁵⁴*People v Cobbs*, 443 Mich 276 (1993).

defendant cannot establish that he was promised HYTA assignment, then he certainly cannot establish that he had a reasonable expectation of receiving a potential benefit from HYTA that induced his guilty plea.

Likewise, HYTA did not promise defendant anything at the time of his plea. The plain language of HYTA, also stated on the HYTA-suitability referral form, made it clear that the potential benefits offered by HYTA only vest after a defendant completes his HYTA assignment and is discharged from it (Defendant-Appellant's Exhibit 9a-10a).⁵⁵ A defendant's subjective expectation or hope of a potential benefit under a discretionary, diversionary statute does not create an enforceable promise that could be considered as an inducement for his guilty plea.⁵⁶

For the sake of argument, even if defendant had been promised HYTA assignment by the trial court in exchange for his guilty plea or the prosecution had agreed to recommend HYTA assignment or not to object it, any benefits offered under HYTA were potential benefits that did not vest unless and until defendant completed and was discharged from HYTA assignment—a status that could be revoked by the trial court at any time before discharge.⁵⁷ In other words, the promise from the court or prosecution would have been for HYTA assignment and the possibility of receiving these potential benefits after completion and discharge from his HYTA assignment and necessarily could not have induced his guilty plea.

Defendant's actions after pleading guilty also belie his claim that his guilty plea was induced by the state's promise that he would forever be free from complying with all civil consequences. In

⁵⁵MCL 762.14.

⁵⁶*United States v Skidmore*, 998 F2d 372, 375 (CA 6, 1993)(considering what the parties "reasonably" understood to be the terms of the agreement).

⁵⁷MCL 762.14.

Spring, 1996, while still on HYTA assignment, defendant learned that he would have to register as a sex offender. At this time, registry information was non-public and only accessible by law enforcement (Defendant-Appellant's Exhibit 12a).⁵⁸ Upon learning this, defendant did not challenge his guilty plea or argue that registration breached a promise that had materially induced his guilty plea. Effective April 1, 1997, SORA was again amended to permit limited public inspection of registration records for sex offenders located in their zip code at law enforcement agency locations during their regular business hours.⁵⁹ The information included the offender's name, aliases, birthdate, physical description, address, and listed conviction offense.⁶⁰ Although he was still a youthful trainee at that time, defendant did not challenge his guilty plea or argue that this limitation on confidentiality or civil duty breached a promise that had materially induced his guilty plea.

On June 5, 1998, approximately a year after his discharge from HYTA assignment, defendant moved to strike his name from the sex offender registration roll. Defendant did not allege in this motion that his guilty plea was induced by a promise made by the state that was breached by requiring him to register as a sex offender. Nor did defendant move to withdraw his guilty plea (Defendant-Appellant's Exhibit 263a-266a). Effective September 1, 1999, SORA was again amended to create a publicly-accessible registry, available on the Internet.⁶¹ At no point, after any of these amendments, did defendant move to withdraw his guilty plea or otherwise challenge it on the basis that it was induced by an unfulfilled promise made by the state promising him freedom

⁵⁸1994 PA 295; *People v Rahilly*, 247 Mich App 108, 114 (2001), lv den 465 Mich 969 (2002).

⁵⁹1996 PA 494; MCL 28.730(2); MCL 28.728(2).

⁶⁰MCL 28.728(2); MCL 28.730(2).

⁶¹*Rahilly, supra*, 247 Mich App at 114, citing MCL 28.728(2).

from civil consequences and confidentiality regarding his sexual assault of a 12-year old child.

Instead, defendant waited nearly 20 years to challenge his guilty plea on any basis. If defendant's guilty plea had truly been induced by a promise that he would be free from all civil consequences and have complete confidentiality, it seems plain that defendant would have challenged his guilty plea on this basis, by moving to withdraw his guilty plea or filing an application for leave to appeal. Defendant's inaction supports the conclusion that defendant's guilty plea was not induced by any promises beyond the hope of receiving the benefits afforded to youthful trainees who successfully completed their HYTA assignments.

2. Upon discharge from HYTA, defendant received the benefits that existed under HYTA at the time of his discharge.

The legislature can constitutionally amend laws that retrospectively affect private rights provided the retrospective amendments are not punitive.⁶² “The right which defendants claim sprang from the kindness and grace of the legislature. It is the general rule that which the legislature gives it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it.”⁶³ Thus, the legislature could constitutionally amend HYTA to require HYTA assignees, who pled guilty to listed sexual offenses, to register as sex offenders.

Moreover, contrary to defendant's argument, the benefit--“freedom from all civil consequences”-- does not appear in HYTA. Rather, HYTA provides that youthful trainees, who successfully complete their assignments and are discharged, “shall not suffer a civil disability or loss

⁶²*Lahti v Fosterling*, 357 Mich 578, 588-589 (1959)(citations omitted).

⁶³*Id.* at 588-589.

of right or privilege” after they are discharged from HYTA assignment.⁶⁴ Sex offender registration is not punishment in the constitutional sense, nor is it a civil disability or a loss of privilege. Rather, sex offender registration requires registrants to take affirmative steps to further a legitimate, civil regulatory goal designed to protect children from sex offenders.

Indeed, defendant received and continues to receive a number of benefits, under HYTA, which explains why he has never moved to withdraw his guilty plea. Defendant does not have a conviction for any purpose other than SORA. He can truthfully report to employers that he does not have a conviction. Significantly, the proceedings of defendant’s case, including the official arrest records, police reports, transcripts, and other documents remain sealed and closed to public inspection. SORA in no way permits public access to these items. Defendant’s successful completion of his HYTA assignment means that his sexual assault offense against a child, which is a 10-year felony against a person, does not prohibit him from possessing a firearm.⁶⁵ Likewise, there is no restriction on defendant’s right to vote. Defendant’s guilty plea does not count as a conviction for purposes of habitual offender enhancements if he is convicted of subsequent offenses.⁶⁶

Another important benefit to defendant that stems from his successful completion of his HYTA assignment is that defendant is exempted from complying with the student safety zones.⁶⁷ This exemption would not have applied if defendant had not pled guilty and been assigned HYTA

⁶⁴MCL 762.14(2).

⁶⁵MCL 750.224f(10)(a).

⁶⁶However, a HYTA “conviction” is scored as a past conviction for purposes of scoring the legislative guidelines. MCL 777.50.

⁶⁷MCL 28.736(1)(c).

status. Finally, the 2004 amendments to HYTA made most sex offenses ineligible for HYTA.⁶⁸ Notably, defendant, who was a 19-year old adult who forcibly, sexually assaulted a 12 -year old child, would be ineligible for HYTA assignment today.⁶⁹

B. HYTA does not create an enforceable contract between youthful assignees and the state

Both the United States and Michigan Constitutions⁷⁰ prohibit the legislative branch from enacting laws that impair contractual obligations.⁷¹ A fundamental precept of our republican system of government is the power of “elected representatives to act on behalf of the people through the exercise of their power to enact, amend, or repeal legislation.”⁷² Thus, there is a strong presumption against statutes creating private contracts.⁷³ The United States Supreme Court aptly explained this presumption thusly:

For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that ‘a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.’ This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the

⁶⁸MCL 762.11(2)(e).

⁶⁹MCL 762.11(2)(e).

⁷⁰US Const, art 1, § 10; Const 1963, art 1, § 10.

⁷¹*AFT Mich v Michigan*, 497 Mich 197, 232-233 (2015); *Aguirre, surpa*, at 715.

⁷²*Id.*

⁷³ *Studier v Michigan Public School Employees Retirement Board*, 472 Mich 642, 660 (2005), citing *Nat’l R Passenger Corp v Atchison, Topeka & Santa Fe R Co*, 470 US 451, 465-466 (1985); *In re Certified Question (Fun ‘N Sun RV, Inc v Michigan)*, 447 Mich 765, 777-778 (1994).

obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.⁷⁴

To determine whether a state law has substantially impaired an existing contract, reviewing courts must determine (1) whether a contractual relationship existed; (2) whether the change in law impairs the contractual relationship; and (3) whether the impairment is substantial.⁷⁵ If there is no contractual relationship, it is not necessary to address the other issues.⁷⁶

To create a contract, the statutory language “‘must be ‘plain and susceptible of no other reasonable construction’ than that the Legislature intended to be bound by a contract.’”⁷⁷ Statutory language that “‘provides for the execution of a written contract *on behalf of the state*’” and obligates the state constitutes evidence that the Legislature intended to be bound by a contract.⁷⁸ Absent statutory language manifesting the state’s clear intent to bind itself, courts should not construe statutory regulations to create private contracts between the state and private individuals. Examples of contractual language that may evidence the state’s intent to enter into a contract include “contract”, “covenant”, or “vested rights.”⁷⁹ The absence of a statutory provision prohibiting

⁷⁴*Nat’l R Passenger Corp v Atchison, Topeka & Santa Fe R Co*, 470 US 451, 465-466 (1985), quoting *Dodge v Board of Education*, 302 US 74, 79 (1937).

⁷⁵*Aguirre, supra*, at 715-716.

⁷⁶*Studier, supra*, at 665-667.

⁷⁷*In re Certified Question, supra*, at 778, quoting *Stanislaus Co v San Joaquin & King’s River Canal and Irrigation Co*, 192 US 201, 208 (1904).

⁷⁸*Studier, supra*, at 662.

⁷⁹*Id.*

repeal or amendment bolsters the presumption that the Legislature did not intend to create a private contract with the state.⁸⁰

The plain language of HYTA indicates that the legislature did not intend for it to create a contract between youthful trainees and the state. First, the decision to grant HYTA is completely discretionary with the trial court. Second, the trial court can revoke a youthful trainee's status at any time, enter the conviction, and proceed to sentencing. Third, the benefits afforded under HYTA do not vest until after the youthful trainee completes his assignment and is discharged from HYTA status. Fourth, HYTA does not contain any contractual language.

Moreover, the legislature has amended HYTA several times. Some amendments expanded HYTA eligibility, like the recent amendment expanding the upper age range to 24-years old offenders.⁸¹ Other amendments, like those made in 2004, limited HYTA eligibility for most sex offenders, particularly for sex offenses committed against children under 13-years old.⁸² The multiple amendments to HYTA demonstrate that the legislature was exercising its prerogative to modify, alter, and amend the law as policy considerations changed. For instance, the timing of SORA's enactment and the concurrent amendment of HYTA and the continued amendment of HYTA each time SORA was amended demonstrate that the Michigan Legislature "plainly intended" for HYTA assignees, who committed certain sexual offenses or against certain classes of victims, including children, to be subject to SORA's reporting and registration requirements.

⁸⁰*Id.* at 662-663.

⁸¹MCL 762.11(1).

⁸²MCL 762.11(2)(e).

Each of its amendments to SORA and HYTA demonstrate that the Michigan Legislature was aware that by requiring HYTA assignees convicted of sex offenses to register, it was limiting the confidentiality provisions of HYTA for sex offenders. Like Congress's enactment of SORNA, the Michigan Legislature clearly considered the competing policy considerations between HYTA's confidentiality provisions for youthful offenders and SORA's protection of the public and struck the balance "*in favor of protecting victims, rather than protecting the identity of*" youthful sex offenders.⁸³

⁸³*United States v Under Seal*, 709 F3d 257, 263 (CA 4, 2013).

III.

The Sixth Circuit Court of Appeals held in *Does #1-5 v Snyder* that applying the 2006 and 2011 amendments to SORA to registrants convicted prior to those dates constituted punishment and thus violated the prohibition against enacting ex post facto laws. The State of Michigan sought certiorari in the United States Supreme Court and its certiorari petition is pending in the United States Supreme Court. The United States Supreme Court's final action may prove determinative to the resolution of certain issues pending in the instant case. This Court should hold this matter in abeyance pending the United States Supreme Court's final action in *Does # 1-5 v Snyder*.

Standard of Review

Constitutional issues present questions of law that this Court reviews de novo.⁸⁴

Discussion

This Court should hold this matter in abeyance pending the United State Supreme Court's final action in *Does #1-5 v Snyder*.

John Does 1-4 and Mary Doe v Snyder, et al, held, *inter alia*, that SORA did not violate the federal constitutional guarantee against the imposition of ex post facto laws or the deprivation of due process.⁸⁵ On August 25, 2016, the Sixth Circuit Court of Appeals reversed the district court decision and held that SORA constituted punishment and violated the prohibition against ex post facto law.⁸⁶ On December 14, 2016, the Michigan Attorney General filed a petition for certiorari in the United States Supreme Court.⁸⁷

⁸⁴*Harvey, supra*, 469 Mich at 6.

⁸⁵932 F Supp 2d 803, 811 (ED Mich, 2013).

⁸⁶*John Does 1-4 and Mary Doe v Snyder, et al*, 834 F3d 696, 705-706 (CA 6, 2016), rehearing den September 15, 2016.

⁸⁷*John Does 1-4 and Mary Doe v Snyder, et al*, 834 F3d 696, 705-706 (CA 6, 2016), rehearing den September 15, 2016, cert petition pending December 14, 2016 (Docket 16-768).

The United States Supreme Court's final action on the petition pending in *Does 1-5, supra* may prove determinative to this Court's resolution of the ex post facto and cruel or unusual punishment issues pending in the instant case. A resolution on those issue might also inform this Court's actions on the remaining answers.

.Relief

WHEREFORE, this Honorable Court should affirm the Court of Appeals decision.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief, Research, Training, and Appeals

\s\Julie A. Powell
JULIE A. POWELL (P62448)
Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-8817

Dated: August 18, 2017